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**IN THE SUPREME COURT  
STATE OF ARIZONA**

In the Matter of:

PETITION TO REPEAL  
RULE 6(E)(4)(e)(2) OF THE  
ARIZONA RULES OF PROTECTIVE  
ORDER PROCEDURE

Supreme Court No. R-12-0007

**First Supplemental Comment  
on (Emergency) Petition  
to Repeal Rule 6(E)(4)(e)(2) of  
the Arizona Rules of  
Protective Order Procedure**

This comment supplements my first comment in this forum (dated 04/13/2012) in support of Mr. Roth's petition to repeal ARPOP Rule 6(E)(4)(e)(2). I will show that, consistent with state law (both then and now), the predecessor to the ARPOP did not support prohibition of firearms in a § 12-1809 civil Injunction Against Harassment. (IAH.)

**I. BACKGROUND**

Since posting my first comment, I tripped across the predecessor to the ARPOP, the Domestic Violence Benchbook (Civil), a.k.a. the Domestic Violence Civil Benchbook, dated November 2006. ([http://supreme.state.az.us/cidvc/\\_private/DVBB.pdf](http://supreme.state.az.us/cidvc/_private/DVBB.pdf)). [EN 1]

## II. ARGUMENT

On page 6, in Section III titled (and commingling) Types of Protective Orders, we read:

### C. Injunction Against Harassment (IAH)

An IAH is **similar procedurally** to an OP but **is governed by a different statute** (A.R.S. § 12-1809) **and is different in scope**.

Hurray! The CIDVC got that part right. (So why the “one form fits all”?)

#### 4. An IAH may:

- a. Enjoin the defendant from committing harassment.
- b. Restrain the defendant from contacting the plaintiff or other specifically designated persons and from coming near the residence, place of employment or school of the plaintiff or other specifically designated locations or persons.
- c. Grant other relief necessary to protect the plaintiff and other specifically designated persons.

And that's it. There is no “procedure” like ARPOP Rule 6(E)(4)(e)(2) here prohibiting firearms in civil injunctions. Nor can a deprivation of a constitutional right via a civil action be in mind.

Now, the Benchbook thoroughly discusses prohibiting firearms in criminal DV situations, always citing appropriate criminal DV law for authority. For example, on page 47, while discussing criminal Domestic Violence firearm

restrictions and Brady (A.R.S. §§ 13-3601 & 3602 and 18 U.S.C. § 922(g) respectively) we read:

2. The Brady Law makes it unlawful for defendants to ship, transport, possess or receive firearms or ammunition in interstate or foreign commerce. (18 U.S.C. § 922(g)).

If a JO issues or modifies an OP after a hearing in which the defendant received actual notice and the defendant had an opportunity to participate and the Brady Law “intimate partner” relationship test is satisfied, then the Brady Law prohibitions apply.

Unfortunately, even though clearly discussing criminal Domestic Violence firearm restrictions and Brady, someone slipped this in on page 48:

**Note: In an IAH, the JO may have discretion to prohibit firearms.**

Where did that come from? And what's the statutory basis for it?

It's simply dicta!

Nor can it be correct dicta. Two years ago in this forum, the Chair of the CIDVC, Judge Ronan, pointed out that an ex parte Brady restriction—as happened to Mr. Roth when Quartzsite Councilman Joe Winslow got a civil injunction against Roth—violates federal law!<sup>1</sup> (Not to mention that Brady does not apply in civil injunctions where the parties are not domestic partners.)

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<sup>1</sup> Comment on R-09-0045, dated 05/19/2010 in the forum.

I don't know when this first crept into the court's "procedures," but it's at least as early as November 2004. The same Note is found page 10 of the predecessor to the Domestic Violence Civil Benchbook, the Criminal Domestic Violence Cases Benchbook, dated November 2004.<sup>2 3</sup>

As with its successor, the Note is dicta, slipped into Chapter IV, titled Firearms and Ammunition. But that Chapter discusses DV law exclusively, citing only A.R.S. § 13-3602(G)(4) and Brady. Nothing in that Chapter transfers over to A.R.S. § 12-1809.

## **CONCLUSION**

As of today, that little Note on a civil IAH has grown to say “The judicial officer shall ask the plaintiff about the defendant’s use of or access to weapons or firearms. The judicial officer may prohibit the defendant from possessing, purchasing or receiving firearms and ammunition for the duration of the Injunction Against Harassment.” (Rule 6(E)(4)(e)(2).)

That's quite an increase from “In an IAH, the JO may have discretion to prohibit firearms.” The additional language was added from ARPOP Rules

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<sup>2</sup> The 2006 DV Civil Benchbook says "The title of this document has been changed from Domestic Violence Cases Benchbook to Domestic Violence Civil Benchbook."

<sup>3</sup> [http://www.supreme.state.az.us/cidvc/\\_private/CrimDVBB.pdf](http://www.supreme.state.az.us/cidvc/_private/CrimDVBB.pdf)

C(5)(d)(1) and (1)(a) which echo statutes about firearms under criminal domestic violence law.

As I pointed out in my previous comment, even today the CDIVC is trying to add language—without Legislative authority—from criminal domestic violence procedure to civil injunction procedure.

In light of this additional history then, in addition to what I found previously, it appears the judicial history of Rule 6(E)(4)(e)(2) is that, in October 2006, someone realized that the prohibitions against firearms in civil injunctions was wholly without merit. So someone added additional “language” to the dicta above and placed it alongside “Other relief” in the draft ARPOP so as to give the dicta the color of law. (Under the guise of A.R.S. § 12-1809(F)(3).)

Now, the Benchbook recognizes its fallibility, offering that "At the time of publication, this benchbook reflects accurate and up-to-date information and forms. However, readers should make themselves aware of any subsequent changes in the law and forms."

By so saying, the Benchbook—and by definition, the ARPOP, being only a Rule 28 "Rule of [administrative] Procedure"—acknowledges it is not law. Rather, it should follow the Legislated law.

Even if, once upon a time A.R.S. § 12-1809 allowed judicial officers to prohibit firearms in civil injunctions (but there is nothing in the annotated A.R.S.

to support that premise), the law regarding the Second Amendment has "changed."  
The SCOTUS has affirmed the Second Amendment is an individual right.

Moreover, the Arizona Legislature has affirmed that the right to keep and bear arms shall not be infringed when it allowed Arizonans to carry concealed without a permit in April 2010.

As such, Rule 6(E)(4)(e)(2) deprives Arizonans of a constitutional right. As such, the ARPOP no longer reflects accurate and up-to-date information. Readers should make themselves aware of the changes in law and repeal this Rule sua sponte.

DATED this 23 day of April, 2012

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**Endnote 1.** The title of the DV Civil Benchbook makes no sense to me since Domestic Violence law is, by statute, criminal, not civil. In fact, Section I of the DV Civil Benchbook begins by citing the Criminal Code, A.R.S. Title 13, to define Domestic Violence Crimes! Nevertheless, the Civil Benchbook refers readers to the "Domestic Violence Criminal Benchbook" for "matters involving criminal law." (See Preface, page vii.)

I cannot find a DV Criminal Benchbook on the Internet and no link is given in the Civil Benchbook. Whatever the Criminal Benchbook may say, it stands to reason that a Criminal Benchbook has no standing when it comes to A.R.S. Title 12 civil injunctions.